TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 342

MADISON L. MILLER, JR., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1934.

CERTIORARI GRANTED DECEMBER 3, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE MACON DIVISION OF THE MIDDLE DISTRICT OF GEORGIA

At. Law. No. —

MADISON L. MILLER, JR., Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

PETITION—Filed April 5, 1932

To the District Court of the United States for the Macon Division of the Middle District of Georgia:

The petition of Madison L. Miller, Jr., respectfully shows:

1

Plaintiff is a resident of Macon, Bibb County, Georgia, and within the jurisdiction of the United States Court for the Macon Division of the Middle District of Georgia.

2

This suit is brought against the United States of America under the laws of the United States, and particularly arising under the World War Veterans Relief Laws of the United States, and is a suit for the recovery of total and permanent disability benefits under yearly renewable term insurance issued to plaintiff through the Bureau of War Risk Insurance while enlisted in the United States Army.

3

Plaintiff enlisted in the United States Army June 5, 1917, and was honorably discharged from the United States Army on April 3, 1919.

4

Plaintiff at the time of his injuries hereinafter described had with the United States a contract of yearly renewable

term insurance in the amount of $10,000.00 under which he [fol. 2] was entitled to $57.50 per month in the event of total and permanent disability.

5

Plaintiff shows that on October 26, 1918, while in the performance of his duties as a soldier in the United States Army, he was seriously injured in France, while moving up to the front with troops to take his position in the front line operations. As a result of this injury his right arm was badly mangled, which required immediate amputation, and the left side of his face was badly injured, which for all practical purposes destroyed the sight of his left eye.

6

Plaintiff shows that at the time of his discharge he was totally and permanently disabled, due to the fact that he had lost his right arm at the shoulder and had lost the sight of his left eye, and that said disability has continued until this day and will continue. Plaintiff shows that while he can see the outline of a large object with his left eye, that this is the extent of its usefulness, and that he is advised by specialists that there is nothing he can do to correct the vision of his left eye, and that for all practical purposes the sight in that eye is permanently gone.

7

Plaintiff shows that he regularly paid the premiums on the yearly renewable term insurance contract issued to him by the United States Government through the Bureau of War Risk Insurance until the date of his discharge; and that at the time of his discharge said insurance was in full force and effect.

8

Plaintiff shows that said insurance was in full force and [fol. 3] effect at the time he became totally and permanently disabled, and that the United States is indebted to him on said contract of insurance in the sum of $57.50 per month from October 26, 1918, to date.

9

Plaintiff shows that on June 5, 1931, he filed with the Veterans Administration his claim for total and permanent

disability benefits under his contract of yearly renewable term insurance, and that said claim was considered by the Veterans Administration, and on April 1, 1932, said claim was denied by the Administrator or Director of Veterans Affairs, whereby disagreement has arisen under said contract of insurance between the Bureau and plaintiff.

10

Plaintiff shows that he has been totally and permanently disabled for a period of 161 months from the date of his injury, and that his total and permanent disability benefits under said contract of insurance amount to $9,257.50 to March 26, 1932.

11

Plaintiff shows that his disability is of such character that it will continue for the remainder of his life, and he is entitled to $57.50 per month as long as his total and permanent disability shall continue.

12

Plaintiff shows that the United States of America by reason of the foregoing facts is indebted to him in the sum of $9,257.50, as of March 26, 1932, and will continue indebted to him at the rate of $57.50 per month.

Wherefore, Plaintiff prays, under the law and the facts, that he do have and recover a judgment against the United States of America in the principal amount of $9,257.50 for total and permanent disability benefits, to which he is en- [fol. 4] titled under said contract of yearly renewable term insurance, up to March 26, 1932, and a further judgment for $57.50 per month as long as he shall continue totally and permanently disabled under the terms and within the meaning of the laws of the United States granting to him War Risk Insurance.

F. L. Clements, Miller & Lowrey, Attorneys for Plaintiff. Of Counsel: Jas. A. Lowrey, Jr., Wallace Miller, P. O. Address: Monica Court, Macon, Ga.

Duly sworn to by Madison L. Miller, Jr. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

The President of the United States to the Marshal of the Middle District of Georgia, Greeting:

The defendant, United States of America, is hereby required, personally or by Attorney, to be and appear at the *next term of* said Court to be held in the City of Macon, Ga., on first Monday in November next, then and there to answer the Plaintiff in an action of complaint, as in default thereof, the said Court will proceed as to justice shall appertain.

Witness, the Honorable Bascom S. Deaver, Judge of the District Court of the United States at Macon, Ga., in said District, this 5th day of April, in the year of our Lord, one thousand nine hundred and thirty-two.

Milton K. Wallace, Deputy Clerk. Miller & Lowrey, Plaintiff's Attorney.

Service of the foregoing petition acknowledged, copy received.

This April 6th, 1932.

Fred W. New, Asst. U. S. Attorney.

[fol. 6] IN UNITED STATESS DISTRICT COURT

[Title omitted]

ANSWER—Filed June 2, 1932

Comes now the defendant and answering plaintiff's petition says:

1

Defendant is without sufficient information either to admit or deny the allegations contained in paragraph one and therefore denies the same.

2

Defendant denies paragraph two.

3

Defendant denies paragraph three.

4

Defendant denies paragraph four.

5

Defendant denies paragraph five.

6

Defendant denies paragraph six.

7

Defendant denies paragraph seven.

8

Defendant denies paragraph eight.

9

Defendant denies paragraph nine.

10

Defendant denies paragraph ten.

11

Defendant denies paragraph eleven.

12

Defendant denies paragraph twelve.

[fol. 7] Wherefore, having fully answered, this defendant prays that it be hence discharged.

Fred W. New. W. A. Bootle, United States Attorney, Attorney for Defendant.

Duly sworn to by Fred W. New. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER—Filed Nov. 16, 1932

Comes now the defendant in the above stated case, and with leave of the Court first had and obtained, amends its answer heretofore filed by striking from said answer paragraphs One, Two, Three, Four, Seven and Nine, and by substituting in lieu of said stricken paragraphs the following paragraphs bearing the same numbers, respectively:

1

Paragraph One is admitted.

2

Paragraph Two is admitted.

3

Defendant admits Paragraph Three except that defendant alleges that the date of the enlistment was June 7, 1917, instead of the date alleged.

4

Defendant denies Paragraph Four as pleaded, but admits that during the period of plaintiff's enlistment and on or about January 22, 1918, there was issued to the plaintiff a certificate of War Risk Insurance in the amount of Ten Thousand ($10,000.00) Dollars, under which the plaintiff would have been entitled to receive from the defendant Fifty-seven Dollars and Fifty Cents ($57.50) per month in the event plaintiff had become totally and permanently disabled during the life of said certificate of insurance.

[fol. 9] 7

Paragraph Seven is admitted.

9

Paragraph Nine is admitted.

Wherefore, defendant prays that this amendment be allowed and ordered filed.

W. A. Bootle, United States Attorney, Attorney for Defendant.

The foregoing amendment allowed and ordered filed.
This 16 day of November, 1932.

Bascom S. Deaver, United States Judge.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

VERDICT

We, the jury, find for the defendant.
This July 10th, 1933.

J. C. Hood, Foreman.

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed July 12, 1933

Whereupon, it is ordered, considered and adjudged that the defendant, the United States of America, have and recover of the plaintiff, Madison L. Miller, Jr., the costs of said action, to be taxed by the Clerk of this Court.
This 10th day of July, 1933.

Bascom S. Deaver, United States Judge. A. Edward Smith, Assistant United States Attorney, Attorney for Defendant.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT IN FORMA PAUPERIS—Filed July 29, 1933

To the Honorable District Court of the United States for the Macon Division of the Middle District of Georgia:

Madison L. Miller, Jr., the plaintiff in the above stated case, brings this petition as permitted by the provisions

of Sect. 832 of Title 28, U. S. C. A., and respectfully shows to the Court the following facts:

1

Petitioner is a citizen of the United States, residing in the City of Macon, Bibb County, Georgia, within the Macon Division of the Middle District of Georgia.

2

Petitioner enlisted in the United States Army June 5, 1917, and was honorably discharged on April 3, 1919.

3

On October 26, 1918, while in the performance of his duties as a soldier in the United States Army, petitioner was totally and permanently disabled as a result of injuries sustained in the wreck of a troop train.

4

In March of 1932 petitioner filed a suit against the United States Government, to the regular May 1, 1932, Term of this Court, in which he sought to recover disability benefits under the provisions of the War Risk insurance contract issued to him by the United States, which said contract was in full force and effect at the time petitioner became totally and permanently disabled.

[fol. 12] 5

Petitioner's said suit came on regularly to be tried in the District Court of the United States for said division and district on the 10th day of July, 1933, before his Honor Bascom S. Deaver, judge presiding, and a jury.

6

Under the pleadings in the case the only issue to be decided was whether or not petitioner was totally and permanently disabled prior to May 31, 1919.

7

The evidence submitted by petitioner showed that prior to May 31, 1919, petitioner's right arm had been amputated above the elbow and petitioner had lost the sight of

his left eye for all practical purposes, having therein only one-tenth of normal vision; that petitioner was otherwise in good health.

8

Petitioner offered evidence showing that he had sought employment continuously from the time of his discharge from the Army; but on account of the loss of his right arm and left eye, had not been able to follow any substantially gainful occupation, but, as a matter of fact, had only been able during said period of fourteen years to earn the total sum of $405.

9

When petitioner rested his case the United States made a motion for a directed verdict in its behalf, on the ground that the evidence offered by petitioner in support of his petition for disability benefits was insufficient to show that petitioner was totally and permanently disabled as alleged in said petition.

10

After argument the Court sustained the Government's motion and directed the jury to return a verdict for the [fol. 13] United States.

11

Petitioner then and there excepted to the judgment of the Court directing the verdict in behalf of the Government, and now desires to prosecute an appeal from said judgment to the Circuit Court of Appeals for the Fifth Circuit.

12

Petitioner believes that the judgment of the trial court in directing a verdict for the Government in his case is erroneous, and that petitioner is entitled to the disability benefits for which he brought suit, and is entitled to carry his case to the Circuit Court of Appeals for the Fifth Circuit in order that said judgment of the trial court may be reviewed and corrected.

13

Petiotner shows that while in the past he has drawn compensation from the United States Government, he was recently advised by the Veterans' Bureau that the laws

under which compensation had theretofore been paid to him had been repealed, and that until his case could be reviewed by the Bureau he would receive no further compensation.

14

Petitioner shows that he has no property and because of his poverty he is without and cannot obtain the money with which to pay the costs of the appeal which he desires to prosecute as aforesaid or to give security for the same. There is no other person interested in said suit except petitioner.

15

Petitioner shows that Sect. 832, Title 28, U. S. C. A., provides that he may prosecute an appeal to the Circuit Court of Appeals or the Supreme Court, including all ap- [fol. 14] pellate proceedings, without being required to prepay fees or costs or paying for printing the record in the appellate court, or giving security therefor, unless the trial court shall certify in writing that in the opinion of the court such proposed appeal is not taken in good faith.

Wherefore, Petitioner prays that he be permitted by order of the Court to prosecute his said appeal as provided in said Sect. 832, Title 28, U. S. C. A.

Madison L. Miller, Jr., Petitioner.

Sworn to and subscribed before me this 11th day of July, 1933. Margaret Haverfield, Notary Public, State of Ga. at Large. (Notary Seal.)

ORDER

The foregoing duly verified petition read, considered and ordered filed.

It is ordered that the petitioner, Madison L. Miller, Jr., be allowed to take an appeal from the Judgment complained of in said petition to the Circuit Court of Appeals for the Fifth Circuit without being required to prepay any fees or court costs or for the printing of the record in the appellate court, or to give security therefor.

So ordered in open court this 12th day of July, 1933.

Bascom S. Deaver, U. S. Judge.

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

At Law. No. 325

MADISON L. MILLER, JR., Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

Bill of Exceptions—Filed July 29, 1933

Be it remembered that at the May Term of said Court, on July 10, 1933, the Honorable Bascom S. Deaver, judge of said Court presiding, the above entitled case came on to be heard, the same being a suit by Madison L. Miller, Jr., against the United States of America on a contract of yearly renewable term insurance issued to the said Madison L. Miller, Jr., through the Bureau of War Risk Insurance while he was enlisted in the United States Army, for total and permanent disability benefits from October 26, 1918, at the rate of $57.50 per month.

It was alleged in the petition and admitted in the answer that a certificate of War Risk insurance in the amount of $10,000 was issued to plaintiff on or about January 22, 1918; that said contract of insurance provided total and permanent disability benefits of $57.50 per month for 240 months, in the event of total and permanent disability; that the premiums on this insurance were paid through April, 1919, continuing the insurance in force to May 31, 1919; that claim for total and permanent disability benefits under said renewable term insurance contract had been filed with the Veterans Administration and denied; and that a disagreement had arisen under said contract of insurance between the Bureau or Veterans Administration and plaintiff. So that the only issue to be tried was whether or not the [fol. 16] plaintiff became totally and permanently disabled within the terms of the War Risk Insurance certificate and the meaning of the War Risk Insurance Act of 1917 and Acts amendatory thereof prior to May 31, 1919.

Upon said hearing or trial the following proceedings were had, to-wit:

A jury was impaneled and sworn according to law.

Counsel for defendant stated in open court that the United States concedes that the injuries of plaintiff are permanent but contends that his injuries are not total within the terms and meaning of the contract and the law.

Thereupon, plaintiff, to sustain the issue, introduced the following evidence:

"MADISON L. MILLER, JR., being sworn, testified:

"I enlisted in the United States Army June 7, 1917; I volunteered. I went to France with the 138th Field Artillery. I was in that regiment at the time I was injured. At the time I was injured I was on a troop train going up to the front, as I thought; I am not certain just where the train was headed for. The train I was on was in a wreck. At the time I was asleep, and the first thing I knew was I heard a big commotion, then I went sailing through the air. Something hit me, and I didn't know anything after that until after they had laid me out by a fire. This occurred on October 26, 1918, at night.

"In this wreck I had my right hand badly mangled and my face and head badly bruised. I received a cut on my forehead and it left this blue scar. The next day they took me to a hospital, and once when the doctor came in to see me he looked very hazy to me, and he told me that my arm would have to come off. They took the arm off the next day, above the elbow. After I came out from under the [fol. 17] ether and was lying there in the bed I tested my eyes. I looked at a clock on the wall about twenty feet away and found that I could see the clock with my right eye but could not tell the time with my left eye; all I could see with my left eye was the hazy outline of the clock. This was the first time I discovered anything wrong with my left eye. A day or so later they had to operate on my arm again and take off another piece of bone so as to let the flesh come down over the end of the bone.

"I was discharged April 3, 1919, from the Walter Reed General Hospital, Takoma Park, District of Columbia.

"My left eye is in the same condition now that it was when I was in the hospital in France in 1918. All I can see out of it now is the outline of big objects.

"Before I entered the Army I was working for the City of Louisville. I was a practical engineer. I first was a rodman, then I operated a surveying instrument. I could

not do this work after I lost my arm; I could not operate the instrument. I am not a graduate engineer. As a boy I went about as high as the third grade of high school. This included one year at Staunton Military School. I went there only one year.

"When I was discharged from the Army I returned to my father's house in Louisville, Kentucky, and lived there with him for some months. About June or July, 1919, I got a job at Camp Taylor, Louisville, Kentucky, as hazard inspector. This job at Camp Taylor was created for me out of sympathy. I considered it a gratuity. It only lasted one month.

"The next job I got was along about the Fall of 1919. I went out to C. V. Visman's packing house in response to notice I had that they wanted men out there. When I got out there they told me they wanted men to lift heavy quarters of meat, and they saw at once that I could not do this [fol. 18] work, having only one arm. So they said they would try to fix me up a job in the office. They gave me a job taking orders, but as I had had only one hand I could not hold the receiver of the 'phone and write down the orders at the same time. Too, I was right-handed before my injury, and could not write very well with my left hand. They saw after a few days that I could not do the work, but told me to stay on a little while longer. However, after three weeks they told me they didn't need me and let me go. I received $25 a week for the time I worked for C. V. Visman & Company.

"The next job I had was with Otis Hidden & Company, a wholesale house at Louisville, Kentucky. They first put me to handling bolts and heavy ironware. Due to the fact that I had only one hand, I was very slow and awkward with this work, and they soon found that I could not do it satisfactorily. So they transferred me to the rug department. In this department they wanted me to take down big rolled-up rugs about fifty feet wide, unroll them, measure them, roll them back up, and stand them back up against the wall. Of course, I could not do this, having only one hand. So I only stayed there a few days. My agreement with these people was that I was to be paid whatever they thought I was worth. Of course, I was not worth anything to them, and they did not pay me anything. This was at Christmas time and they gave me a $10 Christmas bonus; that was all I got from them.

"The next job I got was with the Kokomo Rubber Company. I was to work as a salesman on the road, but I never got on the road. I stayed around the office for a while and they gave me a sample case and tried me out in the city. I had a lot of sections of tires and rubber goods that I was supposed to take around and demonstrate, but, having only one hand, I could not demonstrate these rubber goods; so I sold no rubber goods. I did not get any pay [fol. 19] from this company.

"The next job I tried was with the H. W. Dubiski Company. They were engaged in the business of selling stocks. I worked with this company about twenty-two months, on a commission basis. I was to receive 10%. During this time I made $105. I just could not sell the stock.

"The only other job I had was in 1931 when I came to Macon and tried to sell goods for the Fuller Brush Company. I worked at this from January, 1931, until May, 1931, and sold only $50 worth of goods and made a commission of $20. The reason I failed on these sales jobs is I just did not have any talent for it. For one to be a salesman he has to have a talent for it. You know, some people just can't sell. I tried but I could not sell.

"During the intervals between these jobs I was diligent in my efforts to get employment, but I could not get any because people did not want to employ a one-armed man with one eye when they could get men with two good arms and two good eyes.

"The Government sent me to Cleveland to take an advertising course. I got up there and my health got bad, so I did not finish the course but went back home.

"My father had a little farm of sixty-four acres. He rented out part of this. I did not manage the farm for my father. I knew very little about his business. After my father died, my brother and I subdivided this farm into lots and sold off the lots. The part I got from the sale of these lots was about $2500.

"When I wrote the Government in 1919 that my physical condition was good other than the loss of my right arm above the elbow, I had in mind my general health. I was not suffering from any pain or disease. When I answered the question in my application for life insurance about my eyes, I saw no reason why I should tell them about my [fol. 20] left eye, as the eye was not diseased and I did not

see that this had anything to do with the life insurance or would affect me as a risk for life insurance.

"I have received an average of $90.00 a month from the Government as compensation since my discharge, but have earned by my own efforts only $405 since April, 1919.

DR C. L. PENNINGTON, sworn for plaintiff, testified:

"I am an eye specialist; I have been practicing my profession eighteen years at Macon.

"I examined Madison L. Miller's eyes in September, 1932. He has one-tenth vision in the left eye. This was caused from non-use. His eye condition cannot be corrected now. It could have been corrected if he had been fitted with proper glasses when he was five or six years old. His eye has been defective since birth. The shape of the lens is defective; it is flattened out so that it does not focus. He has no use of the left eye. Of course, the eye is better than no eye at all, for in case he should lose the right eye he could see enough out of the left eye to get around the streets; that is, he could follow the outline of large objects. It is my opinion that his eye was in the same condition in 1918 as it was when I examined it in 1932—only one-tenth vision. The fact that he could only see the outline of a large object, like a clock, twenty feet away in 1918, would indicate that his eye was in as bad condition then as it is now.

"I would say that with the loss of his right arm and his left eye he was totally disabled. You see, having lost an arm on the right side and an eye on the left side, he is much more seriously handicapped than if he had lost his eye and arm on the same side, as he can only use his left arm and hand and has to turn and look at an angle with his right eye and direct the work of his left hand, which makes his handicap much more serious—I would say 50% or 75% [fol. 21] more serious than if he had lost his right eye and had a good left eye on the same side with his left hand.

"I do not know of any gainful occupation that he could follow. He could manage a farm if he knew the farming business, but there are not many fellows with two good hands and two good eyes making anything at farming in

recent years. I don't know about operating an elevator. If he had to operate the elevator and open the doors, he could not do that with just one hand.

"If he lost the sight of his good eye, he could still see enough out of his left eye to get around. One-tenth vision is much less disabling than total blindness.

HAROLD L. STUCKER and A. J. BARTHOLOMEW testified by deposition:

"That they were in the 138th Field Artillery with Madison L. Miller, Jr., and that they saw him at the time of the wreck; that they were on the same troop train that Miller was on that was wrecked in France; that they saw him just after this wreck which occurred in October, 1918; that his right arm and hand were badly mangled; that he received cuts and bruises around the face; that there appeared to be one severe cut about the center of his forehead that left a blue scar, that is there now."

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Upon the conclusion of plaintiff's evidence, counsel for the United States, the defendant herein, moved the Court to direct a verdict for defendant upon the following grounds:

"1. That the plaintiff has produced no substantial evidence to show that the insured was totally and permanently disabled prior to the lapse of his policy.

"2. Because it affirmatively appears from the plaintiff's evidence that the eye disability of the insured existed prior [fol. 22] to the issuance of the war risk insurance contract sued upon, and because the remaining disability, to-wit, the loss of an arm, as a matter of law is not a total disability."

The trial judge, after hearing argument on said motion, announced that he would overrule that ground of the motion for a directed verdict urged by Government's counsel based on plaintiff's evidence that the loss of vision in his

left eye ante-dated the issuance to him of the War Risk insurance contract sued upon. The trial judge said that he would take it as proven that the plaintiff had lost the use of his right arm and his left eye, and that he would direct the jury to return a verdict for the defendant on the ground that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled. Thereupon the Court directed the jury to return a verdict for the defendant, to which said order or ruling of the Court directing a verdict for the defendant, plaintiff then and there excepted, which exception was duly allowed, and now excepts and assigns the same as error.

VERDICT

Pursuant to said order or ruling of the Court directing a verdict for the defendant, the jury returned a verdict for defendant.

Upon the verdict returned at the Court's direction, the Court entered the following judgment:

JUDGMENT

Whereupon, it is ordered, considered and adjudged that the defendant, the United States of America, have and recover of the plaintiff, Madison L. Miller, Jr., the costs of said action, to be taxed by the Clerk of this Court.

"This 10th day of July, 1933.

"Bascom S. Deaver, United States Judge."

[fol. 23] To which judgment plaintiff then and there excepted, which exception was duly allowed, and now excepts and assigns the same as error.

And now, within the time allowed by law, and at the May Term of said Court, during which said judgment was entered, and in furtherance of justice and that right may be done, the plaintiff, Madison L. Miller, Jr., tenders and presents the foregoing as his bill of exceptions in this case, and prays that the same may be settled and allowed and signed and certified by the Court and made a part of the record as provided by law.

F. L. Clements, Miller & Lowrey, Attorneys for Plaintiff.

Due and legal service of the foregoing bill of exceptions acknowledged; copy received, and all other and further service waived. Lodgment in the Clerk's office and notice of application to the Court for approval is hereby waived.

A. Edward Smith, Asst. U. S. Attorney, Attorney for United States of America.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing bill of exceptions was presented within the time allowed by law and is approved, allowed and settled as a correct and complete bill of exceptions, and is certified to contain all the evidence and all the rulings and instructions of the Court necessary to a clear understanding of the errors complained of, and is made a part of the record herein.

This 29 day of July, 1933.

Bascom S. Deaver, U. S. District Judge.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 29, 1933

To the Honorable Bascom S. Deaver, District Judge of the United States Court for the Middle District of Georgia:

Comes now Madison L. Miller, Jr., the plaintiff in the above entitled case, and feeling ag-rieved by the verdict and judgment rendered therein on the 10th day of July, 1933, which judgment was filed on July 12, 1933, does hereby appeal from said judgment to the Circuit Court of Appeals for the Fifth Circuit, for the reasons set forth in the assignment of errors filed herewith; and he, having heretofore filed in said court a statement under oath as to his poverty and procured an order of the court thereon

allowing him to take an appeal in forma pauperis, prays that his appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules of such court in such cases made and provided for appeals in forma pauperis.

F. L. Clements, Miller & Lowrey, Attorneys for Plaintiff. Wallace Miller, Jas. A. Lowrey, Jr., of Counsel.

[fol. 25] ORDER ALLOWING APPEAL

The foregoing appeal is hereby granted and allowed, and the appellant, Madison L. Miller, Jr., is relieved of the prepayment of fees or costs or for the printing of the record in the appellate court, or giving security therefor.

This 29 day of July, 1933.

Bascom S. Deaver, U. S. Judge.

Due and legal service of the foregoing petition for appeal and order thereon acknowledged; copy received and all further service waived.

A. Edward Smith, Assistant U. S. Attorney, Attorney for Defendant.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 29, 1933

Comes now the Plaintiff, Madison L. Miller, Jr., in the above entitled case, and in connection with his petition for appeal files the following assignment of errors, upon which he will rely upon his prosecution of the appeal in the above entitled case, and which it appears were committed by the Court in the trial of said case.

1

The Court erred in directing the jury to return a verdict for the Government, because the plaintiff's evidence raised an issue of fact for the jury to determine.

2

The Court erred in directing the jury to return a verdict for the Government, because it was for the jury to determine whether the plaintiff produced substantial evidence to show that the insured was totally and permanently disabled prior to the lapse of his policy.

3

The Court erred in, on its own motion, directing the jury to return a verdict for the Government, on the ground that an insured who had lost the sight of his left eye and the use of his right arm, but was otherwise in good health, is, as a matter of law, not totally and permanently disabled.

4

The Court erred in entering up a judgment for the defendant on the jury's verdict so directed.

[fol. 27] 5

The Court erred in directing a verdict for the Government, because if the issue of total and permanent disability of the insured under the War Risk contract should be determined as a matter of law and not as a matter of fact, an insured under a War Risk contract who has lost the sight of his left eye and the use of his right arm, is, as a matter of law, totally and permanently disabled within the meaning of the contract of insurance.

Wherefore, Plaintiff prays that the judgment of the District Court of the United States for the Middle District of Georgia in this case entered be reversed, and the said District Court be directed to grant a new trial of said case.

F. L. Clements, Miller & Lowrey, Attorneys for Plaintiff. Wallace Miller, Jas. A. Lowrey, Jr., of Counsel.

Due and legal service of the foregoing assignment of errors acknowledged, copy received, and all other and further service waived.

This 29 day of July, 1933.

A. Edward Smith, Asst. U. S. Attorney, Attorney for Defendant.

[File endorsement omitted.]

[fol. 28] Citation in usual form, showing service on A. Edward Smith, filed July 29, 1933, omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR THE RECORD—Filed July 29, 1933

To the Clerk of the United States District Court, Middle District of Georgia:

You are hereby requested to make a transcript of the record, to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal entered in said cause, and to include in such transcript of record the following parts of the record, to-wit:

(1) The petition of Madison L. Miller, Jr.

(2) The answer of the United States of America.

(3) Amendment to the answer of the United States filed November 16th, 1932.

(4) Verdict of the jury dated July 10, 1933.

(5) Judgment of the Court dated July 10, 1933.

(6) Plaintiff's affidavit of inability to prepay costs of the appeal or give security because of his poverty, with order thereon, dated July 12, 1933.

(7) Bill of exceptions and order approving and acknowledgment of service thereon.

(8) Petition for appeal, with order allowing the same and acknowledgment thereon.

(9) Assignment of errors and acknowledgment thereon.

(10) Citation and acknowledgment of service thereon.
(11) This præcipe, with acknowledgment thereon.

F. L. Clements, Miller & Lowrey, Attorneys for Madison L. Miller, Jr.

[fol. 30] Due and legal service of the foregoing præcipe acknowledged; copy received, and all other and further notice waived.

This 29 day of July, 1933.

A. Edward Smith, Asst. U. S. Attorney.

[File endorsement omitted.]

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] Minute entry of argument and submission, May 2, 1934, omitted in printing.

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7077

MADISON L. MILLER, JR., Appellant,

versus

UNITED STATES OF AMERICA, Appellee

In Forma Pauperis

Appeal from the District Court of the United States for the Middle District of Georgia

Before Bryan, Foster and Sibley, Circuit Judges

OPINION OF THE COURT—Filed June 8, 1934

SIBLEY, Circuit Judge:

On April 12, 1932, Madison L. Miller, Jr., sued on his policy of War Risk Insurance which was issued him July

22nd, 1918, but on which no premiums had been paid since his discharge from the army on April 3rd, 1919, his claim being that he became totally and permanently disabled in a [fol. 34] railroad accident in France on Oct. 26th, 1918. The evidence is scant, but shows that on the date last stated his right arm was mangled and had to be amputated above the elbow, and that while recovering in the hospital he discovered that with his left eye he could distinguish only the outlines of large objects. The vision in that eye is stated to be only ten percent of normal. His medical witness, however, testifies that the defect of the left eye was congenital, stationary and permanent, and existed before the accident. Miller's health except for his eye and arm deficiency was and is good. He had education through third year of High School, and before entering the army did practical land surveying. Since his discharge he has drawn on an average $90.00 per month as compensation. He cannot, with one arm, do surveying as before. He has tried other work, including salesmanship, but could not hold his jobs and had earned less than $500.00 up to the time of filing his claim for insurance on June 5th, 1931. He gives no reason why he had not made claim sooner. His medical witness stated that Miller is under a special handicap because he has to direct his left hand with his right eye, and expressed the opinion that he is totally disabled. He was right-handed originally. The Court directed a verdict for the United States over Miller's contentions, repeated on this appeal, that he was since Oct. 26th, 1918, totally and permanently disabled in law because he had lost the use of an eye and an arm; and if not, that the jury could conclude he was thus disabled in fact.

The claim of total and permanent disability as a matter of law is based partly on the provision of 38 U. S. C. A. § 473, taken from Section 202 of the War Veterans Act of 1924, 43 Stats. 618 as amended March 4th, 1925, 43 Stats. 1306, as follows: "If and while the disability is rated as total and permanent, the rate of compensation shall be [fol. 35] $100.00 per month; provided, however, that the permanent loss of the use of both feet or both hands or of both eyes or * * * of one hand and one eye * * * shall be deemed total and permanent disability * * *. For double total permanent disability the rate of compen-

sation shall be $200.00 per month"; and partly on Regulation 3140, of the Veterans Administration, promulgated March 24th, 1932, which applies the above enumeration of total permanent disabilities to yearly renewable term insurances. The history of the matter is this. The War Risk Insurance Act of 1917 provided in separate Articles for compensation for death or disability contracted in the line of duty, and for insurance against death or total permanent disability. Total permanent disability was not defined by the Act. On March 9th, 1918, it was ruled both as to compensation and insurance that any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed to be total disability, and that the disability shall be deemed permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering it. T. D. 20 W. R. The courts generally accepted this as a correct definition of the total permanent disability insured against, but it was said in Lumbra vs. United States, 290 U. S. at p. 559, not to be an exact definition of total permanent disability or the sole guide by which that expression is to be construed in term insurances. The Act of December 24th, 1919, 41 Stats. 373, amended Sec. 302 of the War Risk Insurance Act of 1917 touching compensation to provide that stated losses of limbs and eyes should be deemed total permanent disability, and the War Veterans Act of 1924 somewhat altered the provisions to read as above quoted. The Bureau meanwhile on Sept. 12, 1921, had made Regulation 4 providing that for compensation [fol. 36] purposes a disability shall be rated as total and permanent when the conditions enumerated in the statute existed, and that for renewable term insurance purposes, and for automatic insurance purposes awards may be made in accordance with the same provisions. The Veterans Administration by its Regulation 3140 made the statutory instances of total permanent disability for compensation purposes mandatorily applicable to term insurance. The regulatory paragraph No. 1115, effective March 2nd, 1931, reads: "A rating of permanent and total disability for insurance purposes will have no effect on compensation and vice versa." We are of opinion that the separation of awards for insurance from those for compensation indi-

cated in this last quoted Regulation is the true interpretation of the statutes. The power to make regulations not inconsistent with the War Risk Insurance Act to carry out its purposes, and to determine upon and publish the full and exact terms and conditions of the contract of insurance which was vested in the Director of the Veterans Bureau subject to the general direction of the Secretary of the Treasury by the Acts of 1917 and 1924 did not extend to making the insurance contract cover more than the death and total permanent disability named in the statute authorizing it. The Administrator of Veterans Affairs under Section 2 of the Consolidating Act, 46 Stats., p. 1016, was given no greater power in this regard than the Director previously had. Regulation 3140, if sustained, would cause an insurance policy to mature, not upon total permanent disability, but upon a one-eyed man's losing his leg, or a one-armed man losing an eye, or the like, regardless of the effect of the loss on his earning capacity. Conceivably such a one might still be able to carry on even his former trade or calling. We do not think the Regulation binding on the courts as a modification or enlargement of the insurance contract. The statutory provision on which it appears to [fol. 37] have been based has no application to War Risk Insurance. It was an amendment of a section in Art. III of the Act of 1917 relating to compensation for disabilities contracted in the line of duty, and reappears in Part II of the Veterans Act of 1924 devoted to that subject. Separate parts of both statutes are devoted to the contract of insurance, where the disability insured against may arise at any time or from any source. The statutory provision refers also to "double total permanent disability" for compensation purposes, whereas there could be no such thing for insurance purposes. Things that Congress has directed shall be deemed total permanent disability as respects the compensation benefits voluntarily bestowed by the Government do not fix the Government's legal liability on its insurance contracts.

Regulations aside, the evidence did not warrant a finding of total permanent disability. The phrase is to be construed reasonably, and having regard to the circumstances of each case, without fixed rules or formulae uniformly governing the construction. Lumbra vs. United States, 290 U. S. 551, 558. Such disability as Miller had because of

his defective eye and the loss of his right hand was permanent, but it was not total. He was without pain or sickness. He had one good eye and the other was of some use. He had never noticed any eye lack, although he had it always, until he experimented in the hospital. It had never handicapped him. The loss of his right hand and forearm was certainly a severe blow to efficiency, but the loss of use of one arm or one leg has never been considered in itself total disability in War Risk Insurance. United States vs. Weeks, 62 Fed. (2d) 1030; United States vs. Thomas, 53 Fed. (2d) 192; United States vs. Mayfield, 64 Fed. (2d) 214; United States vs. Lacy, 64 Fed. (2d) 653; Thompson vs. United States, 65 Fed. (2d) 897; United States vs. Harris, 66 Fed. (2d) 71. We so held in reference to a com- [fol. 38] mercial policy of insurance in Metropolitan Life Ins. Co. vs. Foster, 67 Fed. (2d) 264. Of the many light occupations which it is common knowledge that a one-armed man of high school education may follow, few would require better eye-sight than the surveying that Miller used to do. In spite of his intelligence and the fixed, evident character of his disability, canvassed promptly in seeking compensation, he seems never to have considered it total so as to enable him to claim the insurance. The limitation period of the Act of May 29th, 1928, elapsed, and the extension made by the Act of July 3rd, 1930, was almost gone before his belated claim was filed. Against this situation his failure to find and hold jobs does not prevail. His policy did not cover unemployment, but only disability which prevented him from following continuously any substantially gainful employment. Having no dependents, and $90.00 a month compensation, he was under no necessity to work. Neither do we think the opinion of his physician that he was totally disabled of any weight. That was the ultimate question to be settled by the trial, and a witness ought not to have been allowed to attempt to decide it. United States vs. Sauls, 65 Fed. (2d) 886; United States vs. Bass, 64 Fed. (2d) 467. But he put his opinion solely on the fact of the deficient left eye and the lost right arm, which by themselves under all the circumstances we do not think proved total disability. See United States vs. Owen, — (Fed. (2d) —; United States vs. Hill, 62 Fed. (2d) 1022. Taking into consideration the admitted good health, education and experience of Miller, and his own

conduct with reference to his insurance, we are of opin-
[fol. 39] ion that the jury could not rightly have concluded that he was entitled to recover.

Judgment affirmed.

[fol. 40] In United States Circuit Court of Appeals

No. 7077

Madison L. Miller, Jr.,

versus

United States of America

Judgment—June 8, 1934

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 38,970. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 342. Madison L. Miller, Jr., Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed September 4, 1934. File No. 342, O. T., 1934.

Supreme Court of the United States

Order Allowing Certiorari—Filed December 3, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.